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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 DONALD EUGENE THOMAS, ) CASE NO. CV 11-4443-ODW (PJW)  
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12 Petitioner, )  
13 ) ORDER TO SHOW CAUSE WHY PETITION  
14 v. ) SHOULD NOT BE DISMISSED  
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TERRI GONZALES, WARDEN,  
Respondent.

16 On May 24, 2011, Petitioner filed a Petition for Writ of Habeas  
17 Corpus, seeking to challenge his 2006 state court convictions for  
18 murder, attempted murder, and assault with a deadly weapon. (Petition  
19 at 2.) For the following reasons, Petitioner is ordered to show cause  
20 why his Petition should not be dismissed because it is time-barred.

21 State prisoners seeking to challenge their state convictions in  
22 federal habeas corpus proceedings are subject to a one-year statute of  
23 limitations. 28 U.S.C. § 2244(d). Here, Petitioner's conviction  
24 became final on November 6, 2007, ninety days after his petition for  
25 review was denied by the California Supreme Court on August 8, 2007.  
26 See *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Thus,  
27 Petitioner was required to file his federal habeas corpus petition no  
28 later than November 6, 2008.

1 On February 8, 2008, seven months before the statute of  
2 limitations expired, Petitioner filed a habeas corpus petition in this  
3 court (CV 08-895-ODW (RC)), which was dismissed with leave to amend.  
4 Petitioner then filed a First Amended Petition on March 7, 2008. On  
5 June 25, 2010, the court determined that this petition was a "mixed"  
6 petition, containing both exhausted and unexhausted claims and offered  
7 Petitioner the opportunity to strike or dismiss the unexhausted claims  
8 and proceed only on the exhausted claims. On July 16, 2010,  
9 Petitioner requested that the court dismiss the petition. On  
10 September 2, 2010, the court granted his request and dismissed the  
11 petition without prejudice.

12 Meanwhile, on August 16, 2010, Petitioner filed a habeas corpus  
13 petition in the California Supreme Court, which was denied on February  
14 23, 2011. As noted above, Petitioner filed the instant Petition on  
15 May 24, 2011.

16 The statute of limitations is tolled during the time "a properly  
17 filed application for State post-conviction or other collateral review  
18 with respect to the pertinent judgment or claim is pending." 28  
19 U.S.C. § 2244(d)(2). In the instant case, Petitioner did not file his  
20 first state habeas petition until August 16, 2010, almost two years  
21 after the expiration of the statute of limitations. Thus, there was  
22 no period left to be tolled statutorily when he filed his state habeas  
23 petition in 2010. *See Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir.  
24 2001) (holding that state habeas petition filed after statute of  
25 limitations had expired could not toll the limitation period).


26 Nor did Petitioner's filing of his first federal habeas corpus  
27 petition in February 2008 toll the statute of limitations. *See Duncan*  
28 *v. Walker*, 533 U.S. 167, 181-82 (2001) (holding statute of limitations

1 not tolled during pendency of federal petition). Further,  
2 Petitioner's instant Petition cannot relate back to his first federal  
3 petition because he voluntarily dismissed that petition. See *Green v.*  
4 *White*, 223 F.3d 1001, 1002-03 (9th Cir. 2000)(holding that the  
5 "voluntary dismissal of his earlier habeas petition in order to  
6 exhaust his state remedies" means that "there was no petition pending  
7 to which the new petition could relate back or amend" (internal  
8 quotations omitted)). Accordingly, statutory tolling does not save  
9 the Petition.

10 The statute of limitations is subject to equitable tolling in  
11 appropriate cases. See *Holland v. Florida*, \_\_ U.S. \_\_, 130 S. Ct.  
12 2549, 2560 (2010). Here, however, Petitioner has presented no basis  
13 for tolling the limitations period. Accordingly, the Petition appears  
14 to be untimely.

15 IT IS THEREFORE ORDERED that, no later than **July 1, 2011**,  
16 Petitioner shall inform the Court in writing why this case should not  
17 be dismissed with prejudice because it is barred by the statute of  
18 limitations. Failure to timely file a response will result in a  
19 recommendation that this case be dismissed.

20 DATED: June 1, 2011.

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23 PATRICK J. WALSH  
24 UNITED STATES MAGISTRATE JUDGE  
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